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Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1595

(Consolidated with Nos. 76-1471, 76-1521, 76-1604, 76-1624, and 76-1695)

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Second Report and Order of the Federal Communications Commission (FCC) is reported at 50 F.C.C.2d 1046 (1975) (Joint Appendix (JA) 134). The FCC's Memorandum Opinion and Order, denying petitions for reconsideration of the Second Report and Order, is reported at 53 F.C.C.2d 589 (1975) (JA 317).

The opinion of the United States Court of Appeals for the District of Columbia Circuit, affirming portions of the FCC's order and vacating and remanding other portions, is reported at 555 F.2d 938 (1977) (JA 339). The court's further opinion, granting a motion to stay a portion of its mandate, is reported at 555 F.2d 967 (1977) (JA 437).

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1977. Pursuant to 28 U.S.C. § 2350(a), the National Association of Broadcasters (NAB) filed its Petition for a Writ of Certiorari on May 13, 1977. The Petition was granted by this Court on October 3, 1977. This case has been consolidated for review with five other cases [1] in which Petitions for Certiorari were also granted on October 3, 1977. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."

The relevant sections of the Communications Act, appearing at 47 U.S.C. §§ 151, 152(a), 303(g), and 309(a), and the relevant sections of the Administrative

[1] *FCC* v. *National Citizens Comm. for Broadcasting* (No. 76-1471); *Channel Two Television Co.* v. *National Citizens Comm. for Broadcasting* (No. 76-1521); *American Newspaper Publishers Ass'n* v. *National Citizens Comm. for Broadcasting* (No. 76-1604); *Illinois Broadcasting Co.* v. *National Citizens Comm. for Broadcasting* (No. 76-1624); *Post Co.* v. *National Citizens Comm. for Broadcasting* (No. 76-1685).

Procedure Act, appearing at 5 U.S.C. §§ 556(d) and 706, are reprinted in the Appendix to this brief.

The regulations adopted by the FCC in its Second Report and Order appear as amendments to §§ 73.35, 73.240, and 73.636 of the Commission's Rules and Regulations, and are reprinted as Appendix F to that Report and Order, 50 F.C.C.2d 1046, 1099-1106 (JA 243-63).

QUESTIONS PRESENTED

1. Whether an FCC rule prohibiting broadcasters from publishing daily newspapers in their local communities exceeds the FCC's statutory authority and abridges First Amendment rights.

2. Whether the Court of Appeals erred in finding "irrational" the FCC's decision to apply its new licensing policy prospectively only, rather than retroactively to require divestiture by existing licensees previously found to serve the public interest.

3. Whether the Court of Appeals erred in compelling the FCC to adopt a presumption that no existing broadcast stations affiliated with a local newspaper are in the public interest and that all must be divested.

4. Whether the Court of Appeals erred in ordering the FCC to conclude that a hoped-for increase in diversity is more important than all other competing public interest considerations and must be given controlling weight, notwithstanding the FCC's own contrary assessment of the relevant considerations.

STATEMENT OF THE CASE

This case concerns a Federal Communications Commission rulemaking proceeding, FCC Docket 18110,

dealing with the publication of newspapers by radio and television broadcasters.

The portion of the rulemaking proceeding here at issue began in 1970 with the FCC's issuance of a Further Notice of Proposed Rulemaking (Further Notice), 22 F.C.C.2d 339 (1970) (JA 101). The rules proposed in the Further Notice contained both prospective and retroactive provisions. In essence, the prospective provision would have banned the issuance of a new radio or television license to any applicant who directly or indirectly owned, operated, or controlled a daily newspaper in the community to be served by the broadcast station. In addition, any broadcaster who acquired or established a local daily newspaper would have been required to give up its broadcast license within a year after acquiring or establishing the newspaper.

The retroactive provision of the proposed rules would have required divestitures by all existing broadcasters who did not meet the newly created ban on local newspaper affiliation. Thus, without regard to the grant and repeated renewal of a broadcast license as being in the public interest, and without regard to the quality of broadcast service provided, any existing broadcaster affiliated with a daily newspaper in the same community would have been required to divest itself of either the broadcast station or the newspaper within five years after adoption of the rule.

In the Further Notice, the FCC recognized "the far-reaching ramifications that such rules would have" and acknowledged that it had "insufficient information on the subject." 22 F.C.C.2d at 340 (JA 103). In particular, the FCC expressed its "substantial concern"

about the possible adverse effects of divestiture. *Id.* at 348 (JA 119). Accordingly, comments were invited to enable the Commission "to make a careful examination of the matter." *Id.* at 340 (JA 104). The FCC also recognized that "many will challenge our authority to adopt the rules proposed" and invited comments and legal briefs on that issue. *Id.* at 349 (JA 121).

The Further Notice generated an exhaustive proceeding extending over five years and participated in by nearly 200 parties. In addition to NAB, parties filing comments with the FCC included the Department of Justice, several citizens groups, the American Newspaper Publishers Association, and numerous broadcasters and newspaper publishers. Extensive studies were undertaken by NAB and by other parties, and detailed documented reports were submitted to the FCC.[2] These studies dealt comprehensively with such topics as (1) the multiplicity and diversity of media, including the extent of media affiliation, (2) the effects of common ownership on competition, (3) the effects of common ownership on station performance, and (4) the economic consequences of divestiture.

After consideration of both the extensive written record and three days of oral argument, the FCC announced its decision on the proposed rules in its Second Report and Order (Second Report), 50 F.C.C.2d 1046 (1975) (JA 134). In the Second Report, the FCC first concluded that it had authority under the Communications Act to promulgate the proposed rules, and it rejected constitutional arguments that the rules

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[2] A list of the parties and the major studies submitted is included in the FCC's Second Report and Order as Appendix A. 50 F.C.C.2d 1046, 1090-94 (1975) (JA 221-25).

would violate either the First or Fifth Amendments. 50 F.C.C.2d at 1048-52 (JA 138-46).

After summarizing the record before it, the Commission then discussed separately the prospective and retroactive portions of the proposed rules. The separate treatment was made necessary by several factors uniquely affecting the retroactive proposal: the fact that "divestiture . . . was a departure from the typical Commission approach of limiting any new rules to prospective effect"; the "impact on industry structure" flowing from divestiture; and the substantive differences in the proposed retroactive rule itself. *Id.* at 1047 (JA 137). These considerations persuaded the Commission that the prospective and retroactive proposals had to be "examined separately and tested against appropriate criteria." *Id.* (JA 137).

With regard to a prospective rule governing the grant of new broadcast licenses, the Commission decided to promulgate a rule essentially as proposed in the Further Notice. *Id.* at 1074-78 (JA 190-96). The FCC's basis for adopting the prospective rule was that "any new licensing should be expected to add to local diversity." *Id.* at 1075 (JA 191). Where existing licenses were not divested, the Commission judged itself "free to act to foster diversity without being concerned about negative impact from our action." *Id.* at 1081 (JA 203).

With respect to the retroactive rule, however, the Commission concluded that "more than just theory" or a "hoped for gain in diversity" was required. *Id.* at 1074, 1078 (JA 188, 198). Instead, because of the "substantial impact" flowing from divestiture, it "should be required only when we can determine that

it is required by the public interest." *Id.* at 1080 n.29 (JA 201). Thus, although the Commission viewed the promotion of diversity as an "importan[t]" and "primary" concern, such promotion was "not the only point to consider" in connection with the divestiture proposal. *Id.* at 1078, 1080 (JA 197, 200). Rather, the record demonstrated that "additional public interest considerations" had to be weighed in evaluating the desirability of the "harsh remedy" of divestiture. *Id.* at 1074, 1083 (JA 188, 207). Weighing these considerations, the Commission concluded that "because of the disruption and losses which could be expected to attend divestiture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases." *Id.* at 1080 (JA 201-02).

In deciding not to order universal divestiture, the Commission relied on a variety of public interest considerations. It noted that its own staff study of programming data showed that newspaper-affiliated television stations had a demonstrated record of "statistically significant superiority" in local news and other local nonentertainment programming as compared to other television stations. *Id.* at 1078 n.26 and Appendix C (JA 198 and 230-41). The Commission also found that many of the broadcasters who would be required to divest had established "a long record of service to the public." *Id.* at 1078 (JA 198). It furthermore emphasized that many of these licensees had been pioneers in the earliest years of broadcasting, at a time when there was little "hope of profit," and that were it not for their efforts service in many areas would have been delayed. *Id.* at 1074, 1078 (JA 190, 197-98).

The Commission also noted the evidence that universal divestiture could compel many sales below market

value, increase interest rates, and cause "[l]ocal economic dislocations." *Id.* at 1078 (JA 197). The Commission in addition foresaw that the demands for equity capital to finance divestiture could reduce working capital available for programming service. *Id.* at 1068, 1078 (JA 178, 197). The Commission was concerned that a massive divestiture order would "reduce local ownership" because "many sales would have to be to outside interests" who were neither concerned with, nor knowledgeable about, the local community in which the station operated. *Id.* (JA 197).

Regarding media diversity, the Commission pointed out that only 10.4 percent of the commercial television stations were owned wholly or partly in common with daily newspapers, that this percentage was far below the 48 percent figure that obtained in 1948, and that "a similar pattern of a continuing separation of daily newspapers and television stations" could be observed during the years of the rulemaking proceeding itself. *Id.* at 1080 n.29 (JA 201-02). It was the Commission's opinion that further separations would result both from this normal market pattern and from its adoption of a rule prohibiting new newspaper-broadcaster combinations. *Id.* (JA 202). The Commission furthermore considered it "an important point" that existing affiliated newspapers and broadcast stations are not operated as single entities "speaking with one voice"; to the contrary, the record showed that most have separate managements and facilities, and independent reporting and editorial policies. *Id.* at 1089; *see also id.* at 1059-60 (JA 219-20; 161-62).

The Commission further found that there was not even a claim, much less a showing, that affiliated newspapers and broadcast stations had "committed any specific noncompetitive acts." *Id.* at 1072. (JA 186). The Commission thus pointedly responded to the Department of Justice's position by observing: "Merely stating that all daily newspaper-VHF television combinations are inconsistent with the public interest and the anti-trust laws is not enough." *Id.* at 1080 n.29 (JA 201).

Thus, based on its experience and the enormous factual record before it, the Commission found that the public interest would not be served by the drastic step of universal divestiture. It chose instead to limit its divestiture order to those 16 markets where the sole daily newspaper and the sole broadcast station were commonly controlled. *Id.* at 1081-84 (JA 204-09). Basing a divestiture rule on monopoly considerations, said the Commission, "is a far cry from one based only on some theoretical increase in already existing diversity which might follow from such action and would ignore the ramifications of such a step. Accordingly, we do not believe that further divestiture can be defended." *Id.* at 1083 (JA 207).

Following the Second Report, several parties filed petitions with the FCC for reconsideration or clarification. The Commission denied the petitions and formally terminated Docket 18110 in its Memorandum Opinion and Order dated June 15, 1975. 53 F.C.C.2d 589 (1975) (JA 317).

A number of parties, including NAB, timely petitioned the Court of Appeals for the District of Columbia Circuit pursuant to 28 U.S.C. § 2342(1), requesting review of the FCC's decision in its Second Report. The court consolidated the petitions and on March 1, 1977 issued its decision in the consolidated cases. 555 F.2d 938 (1977) (JA 339).

The Court of Appeals, in an opinion by Chief Judge Bazelon, affirmed the FCC's prospective rule, finding it to be rational and within the Commission's statutory authority. *Id.* at 947-52 (JA 362-81). The court also rejected all constitutional objections raised. *Id.* at 953-54 (JA 381-88). However, the court reversed the agency's decision not to require the sweeping, across-the-board divestiture originally proposed; it furthermore ordered the agency, on remand, to require such divestiture. *Id.* at 965-67 (JA 426-31).

Following the Court of Appeals' decision, the FCC moved the court to stay its mandate with respect to the retroactive divestiture rule to permit the agency to seek review of the decision by this Court. The Court of Appeals, by order filed April 5, 1977, granted the motion. 555 F.2d at 970 (JA 444).

NAB filed its Petition for a Writ of Certiorari on May 13, 1977. This Court granted the Petition on October 3, 1977, and consolidated the case with five other cases in which it granted Petitions for Certiorari on the same date.

SUMMARY OF ARGUMENT

The FCC regulations before this Court exceed the agency's authority under the Communications Act to regulate "communications by wire and radio." They represent an unprecedented Commission attempt to regulate all forms of mass communication, including not only the broadcast media, but the print media as well. In so doing, they conflict with the agency's own longstanding interpretation of its authority, the intent of Congress as expressed in the legislative history, and unanimous judicial opinion, all of which have consistently denied that the Act empowers the Commission to exclude newspaper publishers from broadcasting.

The sanctions imposed in the present regulations not only exceed the statutory grant, but they violate the First Amendment as well. By conditioning the grant of a broadcast license upon an applicant's forfeiture of the right to publish a local newspaper, the regulations unconstitutionally abridge the freedom of the press. They do this on the mistaken premise that government may abridge speech in order to achieve diversity. The Constitution shields newspapers from all such governmental efforts, and immunizes them from laws not of general application. Thus, although regulations refusing licenses to broadcasters or publishers engaging in anticompetitive practices violative of general antitrust policies might have been constitutionally permissible, these regulations sweep far beyond any legitimate regulatory purpose, and therefore cannot withstand the exacting scrutiny which the First Amendment requires.

If, however, the FCC's regulations are determined to be in accordance with statutory and constitutional law, then the Court of Appeals' review of those regulations was limited to the question whether they were arbitrary or capricious. The regulations could in no event be supplanted by the court's own judgment as to a wiser regulatory scheme. But that is what occurred here. Adhering to well-established policies against retroactive rulemaking, taking into account the sharp break from previous practice presented by its new rule, and weighing the harm to the public interest threatened by widespread divestitures of existing licensees, the Commission exercised its discretion against universal divestiture of all newspaper affiliates. The Court of Ap-

peals set this reasoned judgment aside, and ordered the FCC to apply the ban retroactively as well. In so doing, the lower court impermissibly intruded upon the agency's prerogative to apply its rule prospectively, inexplicably compelled the agency to adopt a "presumption" against all newspaper-affiliated broadcasters, and unjustifiably substituted its own balancing of the competing policy interests in determining whether divestiture would be in the public interest.

ARGUMENT

I.

THE REGULATIONS EXCEED THE FCC'S STATUTORY AUTHORITY UNDER THE COMMUNICATIONS ACT

The regulations adopted by the FCC in its Second Report, as expanded by the Court of Appeals in its decision below, prohibit any broadcaster from establishing, acquiring, or owning a local daily newspaper and prohibit any daily newspaper publisher from operating a radio or television station in his community. The Communications Act grants no authority to the FCC to promulgate such regulations, and the FCC's action directly contravenes Congress' express intention that "the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or an association with, a newspaper."[3] Moreover, if the Act did grant such authority, it would be an unconstitutional abridgement of rights protected by the First Amendment. The

[3] Conf. Rep. No. 2426, 82d Cong., 2d Sess. 15 (1952). *See* legislative history discussed *infra* at 18-20.

lack of statutory authority is discussed below, and the constitutional infirmity of the regulations is then treated in the following section.

A. The Regulations Reach Beyond "Communication by Wire and Radio" and Attempt to Control All Communications Media

The FCC's sole authority under the Communications Act of 1934 is to regulate "communications by wire and radio."[4] The regulations here exceed the bounds of this statutory grant by attempting to regulate the whole of the mass communications media, including not only wire and radio, but the print media as well. Neither in their purpose nor in their application can the regulations be defended as an attempt to regulate broadcasting alone.

Both the Commission and the Court of Appeals readily acknowledged that the regulations were an effort by the FCC to restructure the mass communications media generally. Thus, in the court below, the Commission described its regulations as designed "to promote greater diversity of ownership of the mass communications media." FCC Ct. App. Brief at 2. It rationalized this expansion of its regulatory reach to include newspapers as well as broadcasting on the ground that "both are sources of news and opinion." *Id.* at 31. Similarly, the Court of Appeals at the outset of its opinion declared that the subject of the regulations was "media ownership concentration." 555 F.2d

[4] Section 1 of the Act provides that the FCC is created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151 (1970). Section 2 defines the scope of the Act by providing that it "shall apply to all interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a) (1970).

at 943 (JA 346). The court found that the regulations were the outgrowth of the Commission's concern with "the public interest in a diversified mass communications media" and were based upon the "promotion of media competition and maximum diversification of media viewpoints." *Id.* at 944, 945 (JA 350, 353-54).

These descriptions of the purpose and scope of the regulations necessarily speak broadly in terms of "mass communications media," "sources of news and opinion," "media ownership," "media competition," and "media viewpoints," rather than broadcasting only. This is because, while the rationale for the regulations is the promotion of diversity, by their very nature they do not and cannot promote diversity *in broadcasting*. They do not increase the number of broadcasting channels available; nor do they increase the number of different persons operating broadcast stations. Instead, they bar broadcasters from local newspaper publishing and exclude local newspaper publishers as a class from eligibility to hold broadcast licenses solely because of their role in the nonbroadcasting media.

The regulations would be fully complied with if all existing and would-be broadcasters simply stopped publishing newspapers in their local communities. Alternatively, if existing broadcasters traded their broadcast stations with other broadcasters in distant markets so that they no longer broadcast and publish in the same community, the regulations again would be satisfied. Finally, newspaper publishers could give up their broadcast licenses altogether in order to continue publishing. None of these options would increase broadcasting diversity, either in terms of the number of different broadcasting voices in any local market or in the aggregate number of broadcasters nationally.

The FCC concedes that its regulations are not based on any finding that a broadcaster's affiliation with a local newspaper publisher detracts from its broadcast performance. To the contrary, in repeated license renewals the FCC has found that such broadcasters serve the public interest, and in the Second Report it again acknowledged their "long record of service to the public." 50 F.C.C.2d at 1078 (JA 198). Indeed, the FCC's own staff study showed that broadcasters affiliated with newspapers have demonstrated "statistically significant superiority" in the critical area of local programming, including local news and public affairs. *Id.* at 1078 n.26 and App. C. (JA 198 and 230-41). Nor did the record show any evidence that affiliated broadcasters have any unfair economic advantage, have engaged in improper practices, or have limited competition in broadcasting. Thus, the Commission made clear that "[n]o claims were made that newspaper-television station owners have committed any specific non-competitive acts as such" and that its regulations were "not in the least premised on the existence of improprieties in the operation of the media holdings." *Id.* at 1072, 1085 (JA 186, 211).

The present regulations thus are fundamentally different from past FCC actions such as its so-called "duopoly" or "one-to-a-market" rules and its chain broadcasting regulations.[5] Those regulations are also premised upon a theory of diversity, but unlike the present Order, they seek to increase diversity within broadcasting, not in the communications media generally. Here, in contrast, both by design and effect the FCC has set out to regulate all of the mass communications media.

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[5] 47 C.F.R. §§ 73.35, 73.136, 73.240, 73.636 (1976).

The limitation of the FCC's authority to the regulation of "communication by wire and radio" marks the outer boundary of permissible FCC action, and Commission regulations can be valid only if their subject matter lies within the sphere thus committed to the agency. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167-68, 178 (1968); *see United States* v. *Midwest Video Corp.*, 406 U.S. 649, 675-76 (1972) (Burger, C.J., concurring in the result). Even if the Constitution permitted Congress to give such power to any agency, which we believe it does not, Congress has not given the authority to the FCC in the Communications Act to regulate the mass communications media as the Commission has attempted to do here.

B. Congress, the Courts and the FCC Itself Have Consistently Found the FCC to Lack the Authority to Exclude Newspaper Publishers from Broadcasting

As discussed above, the plain words of the Communications Act negate any claim of authority for the Commission's attempt to expand its mandate to sweep across all forms of communications media, including the press. Moreover, in every prior instance in which the question has arisen whether the Commission has authority to exclude newspaper publishers from obtaining broadcast licenses, the consistent answer by Congress, by the courts, and by the FCC itself has been in the negative.

The leading judicial decision denying the FCC's authority to promulgate such a regulation is *Stahlman* v. *FCC*, 126 F.2d 124 (D.C. Cir. 1942). *Stahlman* presented the question of the enforceability of a subpoena issued by the FCC in connection with an investigation of newspaper-broadcast affiliation. While the court upheld the subpoena, it squarely rejected any suggestion that the FCC had the authority under the Act to preclude newspaper publishers from operating broadcast stations. The court found that such a rule or policy would be "wholly outside of and beyond any of the powers with which Congress has clothed the Commission." 126 F.2d at 127. The court explained:

> [W]e have previously held that there is nothing in the Act which either prevents or prejudices the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station. Tri-State Broadcasting Co. v. Federal Communications Comm., 68 App. D.C. 292, 96 F.2d 564. Further consideration confirms that view.
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> * * *
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> [The authority to assess the qualifications of applicants for broadcast licenses] does not embrace and should not be extended by implication to embrace a ban on newspapers as such, for in that case it would follow that the power to exclude exists also as to schools and churches; and if to these, the interdict might be applied wherever the Commission chose to apply it. This, we think, would be in total contravention of that equality of right and opportunity which Congress has meticulously written into the Act, and likewise in contravention of that vital principle that whatever fetters a free press fetters ourselves. In this view, we need not consider whether the power exists even in Congress, for *Congress has not undertaken, and probably never will undertake, to delegate such power to the Commission.* [*Id.* (emphasis added).][*]

[*] The *Stahlman* decision on this point was subsequently cited with approval by the same court in *McClatchy Broadcasting Co.* v. *FCC*, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957). Until the decision below, no court had ever found to the contrary.

Following this decision by the Court of Appeals, the Commission terminated its investigation and declined to promulgate any regulations concerning newspaper-radio affiliation, citing specifically the "grave legal and policy questions involved." 9 Fed. Reg. 702 (1944). Instead, the Commission forwarded the results of its investigation to Congress for its consideration. *Id.*

The court's decision in *Stahlman* and the FCC's action transmitting the results of its investigation to Congress rather than acting itself were both consistent with the FCC's own longstanding interpretation of the Act as not conferring the authority to bar newspaper publishers from eligibility for broadcast licenses. As early as January 1937, less than three years after passage of the Communications Act, the agency specifically considered the question whether its licensing power could be used to deny radio licenses to newspaper publishers. The Commission, in a formal opinion by its first General Counsel, Hampson Gary, concluded that the Act gave it no such power. (JA 445).[7] The opinion was transmitted to both houses of Congress.

The FCC consistently adopted the same view of its power for nearly four decades, up to the time the present rule was adopted. Most noteworthy, it repeated that position before Congress on at least two separate occasions and thereby succeeded in dissuading Con-

[7] Mr. Gary summarized his conclusion as follows:

> In my opinion, therefore, the Commission does not have the authority, under the existing law and in the absence of an expression of public policy on the subject by the Congress, to deny an application to a newspaper owner for radio facilities solely upon the ground that the granting of such an application would be against public policy. (JA 449).

gress from enacting amendments to the Act that would have expressly prohibited the Commission from adopting such a rule.

In 1947, legislation was considered that would have expressly prohibited the Commission from taking such an action.[8] Following testimony by the FCC Chairman that the proposal in fact reflected the agency's practice under the existing statute,[9] further consideration of the proposal was terminated.

A second major Congressional reexamination of the Communications Act began in 1949 and culminated in the 1952 Communications Act Amendments. Again, a proposal was made to add a provision that would confirm that the Act conferred no power upon the FCC to promulgate any rule or procedure excluding newspaper publishers or discriminating against them in broadcast licensing,[10] and again the FCC Chairman testified that the FCC had no such authority under the existing statute.[11] The Senate Committee decided to delete the provision from the bill, explaining:

> It should be distinctly understood that in eliminating the section the committee has done so solely because the Commission is now following the procedure which was outlined in the section, has testified that it intends to follow that procedure, and

[8] The proposal was the White-Wolverton Bill, S. 1333, 80th Cong., 1st Sess. § 25 (1947).

[9] Hearings on S. 1333 Before Sen. Comm. on Interstate & For. Commerce, 80th Cong., 1st Sess. 44, 69-70 (1947) (testimony of FCC Chairman Denny).

[10] The proposal was S. 1973, 81st Cong., 1st Sess. § 14 (1949).

[11] Hearings on S. 1973 Before Sen. Comm. on Interstate & For. Commerce, 81st Cong., 1st Sess. 20-21, 103-04 (1949) (testimony of Acting FCC Chairman Hyde).

> that it is of the opinion that it has no legal or constitutional authority to follow any other procedure. [S. Rep. No. 741, 81st Cong., 1st Sess. 3 (1950).]

Following this action by the Senate, the joint House-Senate Conference decided to adopt the same approach in reconciling the different versions of the bill as passed by the two houses. The Conference Committee explained that the provision was omitted solely because it was "unnecessary" since:

> [U]nder the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or an association with, a newspaper .... [Conference Report No. 2426, 82d Cong., 2d Sess. 15 (1952).]

Thus, Congress has specifically considered precisely the question now before this Court and, expressly relying on the FCC's own longstanding interpretation and the reaffirmation of that interpretation before Congress, it left no doubt that the Act does not confer the authority now asserted by the Commission.

C. The Court of Appeals Erroneously Construed the Scope of the FCC's Regulatory Authority Under the Communications Act

The Court of Appeals brushed aside as immaterial both the FCC's interpretation of the Act and the actions of Congress confirming its intention. 555 F.2d at 951-52 (JA 375-78). In so doing, the court ignored established doctrines of statutory construction as well as its own prior decision construing another section of the same Act.

An agency's own interpretation of its statutory authority is entitled to great weight. 1 K. Davis, *Administrative Law Treatise* § 5.06 (1958). This is particularly true when, as here, the agency interpretation includes a contemporaneous construction of the statute by the persons responsible for setting it into operation. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). *Accord, NLRB* v. *Boeing Co.*, 412 U.S. 67, 74-75 (1975); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *FTC* v. *Mandel Brothers*, 359 U.S. 385, 391 (1959).

This Court's recent unanimous decision in *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395 (1975), demonstrates the lower court's total departure from established proper standards of construction. *Chemehuevi* presented the question whether the FPC's statutory licensing power included thermal-electric plants. In concluding that the statute did not include such plants, this Court found that its conclusion was "reinforced by the Commission's consistent interpretation of that authority as not including jurisdiction over ... thermal-electric power plants." 420 U.S. at 408. It further emphasized the "great respect" due an agency's interpretation when it involves "a contemporaneous construction of the Act by the officials charged with the responsibility of setting its machinery in motion." *Id.* at 409-10. The Court also found the interpretation further "enhanced" by the fact that in amending the Act and later reenacting it "Congress gave no indication of its dissatisfaction with the agency's interpretation of the scope of its licensing jurisdiction." *Id.* at 410.

The *Chemehuevi* decision is representative of a long line of cases mandating the same canons of statutory

construction. For example, in *Saxbe* v. *Bustos*, 419 U.S. 65 (1974), the Court found a "longstanding administrative construction" by the Immigration and Naturalization Service "entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched." 419 U.S. at 74. *Accord, e.g., Cammarano* v. *United States*, 358 U.S. 498, 510-11 (1959); *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269, 273 (1933).

The Court of Appeals itself has previously followed the same approach with respect to the Communications Act. In *Kay* v. *FCC*, 443 F.2d 638 (D.C. Cir. 1970), a political candidate challenged the FCC's interpretation of the "equal time" requirement of § 315(a) of the Act. The court rejected the candidate's challenge, relying on the facts that the FCC had consistently interpreted the section as excluding such claims and that, on two occasions, Congress had reviewed and amended § 315 without making any change in the Commission's interpretation. The court concluded:

> [A] consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval. [443 F.2d at 646-47.]

The decision in *United States* v. *Wise*, 370 U.S. 405 (1962), relied upon by the court below (555 F.2d at 952 n.41 (JA 378)), is in no way to the contrary. In *Wise*, the Court rejected as "an artificial interpretation of a seemingly clear statute" the argument that a corporate officer is not a "person" within the meaning of § 1 of the Sherman Act. 370 U.S. at 407. In this context, the Court found it unpersuasive that a bill had been introduced, but not passed, that would have amended the definition of "persons" under the Act to include corporate officers. *Id.* at 411. The Court explained that "several equally tenable inferences could be drawn" from the failure to enact the amendment, including the inference that Congress thought the amendment unnecessary because corporate officers were already included. *Id.* The Court also noted that the consistent interpretation by the Department of Justice had been to the contrary and that it had consistently sought and obtained indictments of corporate officers under Section 1 since its enactment. *Id.* at 406-07, 415.

Wise is wholly inapposite to the present case. Here, Congress' decision against expressly limiting the FCC's regulatory authority over newspapers is fully explained in the legislative history and is subject to but one interpretation. Congress made unmistakable that its basis for rejecting the proposed amendments was that it considered them unnecessary: since the Act itself granted no such newspaper regulatory authority, no limiting provision was required. Moreover, Congress found that its view had been confirmed by the FCC's own consistent interpretation and application of the Act and in the FCC's testimony before Congress. Hence, the casual dismissal by the court below of both the clear congressional intention and the FCC's own interpretation flagrantly disregarded the controlling principles of statutory construction. *Chemehuevi Tribe, supra,* 420 U.S. at 408-10.

Having thus dismissed the agency's construction and the actions of Congress, the court below rested its construction of the statute almost entirely on *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). In *Storer*, this Court upheld the FCC's regulations

limiting the number of *broadcast licenses* that would be granted to a single applicant. The regulations, described by this Court as intended "to avoid overconcentration of broadcasting facilities" (351 U.S. at 193), had nothing to do with newspapers or any other nonbroadcasting media. No claim was made that the subject matter of the regulation was outside the sphere of FCC authority under the Communications Act. In short, the basic issue of the FCC's authority to extend its regulatory reach to newspapers, which is at the heart of the present regulations, was not an issue in *Storer*.

Thus, *Storer* cannot provide any support for the present effort by the Commission to extend its authority. Instead, the lower court's blithe assertion that "[i]t requires no extension of *Storer* to conclude the Commission possessed statutory authority" to impose its newspaper ban (555 F.2d at 951 (JA 376)), betrays a patent misunderstanding of the cited case and either a total misunderstanding of the issue presented or an inability to come to grips with that issue.

The court's failure to confront the issue presented is epitomized by its assertion that the ban involves no expansion of FCC authority beyond broadcasting because it "simply imposes qualifications for broadcast licensees." *Id.* at 952 n.41 (JA 378). This statement ignores the fact that the "qualifications" imposed are based solely on participation in newspaper publication, a field over which the Commission has no authority, and are by design and effect a mandate for restructuring the communications media, including the print media, in accordance with FCC values and policies. Broadcast qualifications cannot be used as a means for regulating nonbroadcast fields. As the Court of Appeals

for the Second Circuit observed in invalidating FCC regulations designed to promote competition in the data processing industry:

> The Commission argues that it may properly make regulations which are based upon anti-trust considerations. Again we have no quarrel with the proposition of law. However, the unfair competition, restraint of trade, or potential threat of monopoly, must be in a market in which the Commission has jurisdiction. [*GTE Service Corp.* v. *FCC*, 474 F.2d 724, 733-34 (2d Cir. 1973).]

Similarly, here, the Commission has sought to extend its regulatory reach to promote its view of the public interest in areas over which it has no authority. The Commission's regulations are not "justified by reasons which are properly the concern of that agency." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 116 (1976). They fly in the face of the clear language of the Act, the Commission's own longstanding interpretation, and the express declaration of Congress. They must therefore be set aside as an unauthorized expansion of the FCC's regulatory reach.

II.

THE REGULATIONS VIOLATE THE FIRST AMENDMENT GUARANTEE AGAINST LAWS ABRIDGING FREEDOM OF THE PRESS

An even more fundamental reason for finding the challenged regulations to be beyond the FCC's authority is that they are so plainly beyond the constitutional authority of *any* agency of our government. The FCC regulations, as expanded by the Court of Appeals, constitute a governmental effort to orchestrate the sounds of all major media instruments in this country. By

federal fiat, they impose this policy: those whom the government allows to broadcast, it will also prohibit from publishing daily newspapers in the same community. If it be concluded that Congress authorized the FCC to impose such a policy, then the underlying constitutional issue must be reached: whether Congress itself had the power to grant such an authority.

A. The Government May Not Constitutionally Condition its Grant of a Privilege Upon the Forfeiture of First Amendment Rights

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ." The challenged regulations achieve precisely what the Amendment prohibits. They condition the granting of a broadcast license upon a forfeiture of the right to publish a local newspaper; conversely, they penalize the exercise of the right to publish a local newspaper by withholding any opportunity to seek a broadcast license. They do this in the face of this Court's repeated statements that such interference with First Amendment rights is unconstitutional:

> In *Perry* [v. *Sindermann,* 408 U.S. 593, 597 (1972)], the Court broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit, stating that the Government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall,* 357 U.S. 513, 526. Such interference with constitutional rights is impermissible." [*Elrod* v. *Burns,* 427 U.S. 347, 359 (1976) (Opinion of Brennan, J.).]

Accord, Abood v. *Detroit Board of Education,* 431 U.S. 209, 234 (1977); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-06 (1967); *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963).

The Court of Appeals justified the First Amendment infringement on two grounds. It said, first, that since the design of the regulations and the intent of the First Amendment are actually identical—promoting the diversity of available information—the regulations not only do not violate the Amendment, but indeed further its purpose. Second, it held that, in any event, newspapers are not immune from laws of general application which may indirectly burden publication. 555 F.2d at 949, 950-51, 953-54 (JA 369, 374, 381-88). The first contention demonstrates a fundamental misconstruction of the First Amendment; the second relies on a principle which has no application to this case.

B. The First Amendment Does Not Empower the Government to Abridge Freedom of the Press In Order to "Promote Diversity"

Notwithstanding this Court's unequivocal decisions to the contrary, the notion that the First Amendment affirmatively charges government with power to go forth and establish diversity of opinion in the land—enhancing some voices, modulating others, and even silencing a few where need be—still retains currency. It is this wrongheaded notion which underlies the Court of Appeals' decision:

> Since denying access to the airwaves to some involves a substantial though at this time necessary,

restriction of speech, it follows that the Commission acts properly when it attempts to promote diversity by allocating stations to those without control over an alternative major media voice.

* * *

One way to attempt to equalize debate is by boosting the power of the weaker voice; another way is by reducing the power of the dominant one.

* * *

The First Amendment seeks to further the "search for truth." Surely that search will be facilitated by government policy that encourages the maximum number of searchers.

* * *

In fact, the very claim of constitutional abridgement is ironic. First of all, the [regulations are] an attempt to enhance the diversity of information heard by the public without on-going government surveillance of the content of speech. [555 F.2d at 949, 950 n.32, 950-51, 954 (JA 368-69, 372, 374, 388).]

These ideas are a perversion of the First Amendment, and they have been categorically rejected by this Court.

The first significant governmental effort to promote First Amendment "values" by abridging the press came in *Mills* v. *Alabama*, 384 U.S. 214 (1966). In order to ensure a balanced presentation to the voters and to prevent the dissemination of opinions that could not be timely and adequately answered by opposing viewpoints, the Alabama legislature prohibited newspapers from publishing editorials on election day. The Alabama Supreme Court upheld the regulation, finding it to be a "reasonable restriction" upon the press, particularly in light of its "salutary" purpose. 384 U.S. at 219. This Court reversed, declaring that no test of

reasonableness could save the law, that it violated the First Amendment, and that: "It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." *Id.*

The *Mills* decision went unheeded. In 1972, the State of Florida attempted to enforce a "right of reply" statute requiring newspapers to print the response of any candidate whose character or public record they assailed. Before this Court, the statute's proponents sought to justify it on the precise ground forming the linchpin of the Court of Appeals' decision in this case: "that government has an obligation to ensure that a wide variety of views reach the public." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247-48 (1974).

In holding the statute unconstitutional, this Court set out in some detail the beneficent rationale of the statute as advanced by its advocates: that, although easy access to the marketplace of ideas may have existed when the First Amendment was adopted, it is no longer so; that the past half century has seen a communications revolution in which the power to inform the American people and shape public opinion has become concentrated in the hands of a few; that newspaper chains and one-newspaper towns where the same interests own a radio or television station are representative components of this concentration; and that the public's First Amendment interest in being informed has been jeopardized by such media concentration. 418 U.S. at 248-51.

The proposed method for restoring this First Amendment interest was to require that newspapers, like broadcasters, become "surrogates for the public" and provide a forum for views conflicting with the pub-

lisher's own. The proponents of enforced access found authority for their proposal in *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945), wherein the Court rejected the argument that the First Amendment immunizes the press from antitrust laws, and in *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964), wherein the Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Based on these cases—the same ones relied upon by the court below—it was argued that government was authorized to establish and regulate the "wide-open" debate envisioned by the First Amendment. 418 U.S. at 251-52.

These arguments were rejected by the *Tornillo* Court for the same reason they should have been rejected by the Court of Appeals in this case:

> However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment . . . . [*Id.* at 254 (footnotes omitted).]

The point is simply that the First Amendment commands government to stay out of the marketplace of ideas, "regardless of how beneficent-sounding" its purposes for managing that marketplace may be. *Id.* at 259 (White, J. concurring).

Last year, this Court had occasion to make this point again in the strongest possible terms. Congress, in an effort to regulate the relative strengths of voices raised during election debates, placed a dollar limitation on

campaign advocacy. The Court's condemnation of such legislation was unreserved:

> It is argued . . . that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . . [*Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976).]

In *Buckley* the Court furthermore put to rest any idea that the government's regulatory powers over broadcasting may be extended to inhibit "traditional" First Amendment activities:

> Neither the voting rights cases nor the Court's decision upholding the Federal Communications Commission's fairness doctrine lends support to appellees' position that the First Amendment permits Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments of our society.
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> . . . .
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> In *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Court upheld the political-editorial and personal-attack portions of the Federal Communications Commission's fairness doctrine. That doctrine requires broadcast licensees to devote programming time to the discussion of controversial issues of public importance and to present both sides of such issues. *Red Lion* "makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case," by demonstrating that " 'it is idle to posit an unabridgeable First Amendment right to broad-

> cast comparable to the right of every individual to speak, write, or publish.'" *Columbia Broadcasting* v. *Democratic Comm.*, 412 U.S. 94, 101 (1973), quoting *Red Lion Broadcasting Co., supra*, at 388. *Red Lion* therefore undercuts appellees' claim that § 608(e)(1)'s limitations may permissibly restrict the First Amendment rights of individuals in this "traditional free speech case." [424 U.S. at 49-50 n.55.]

The regulations struck down in *Mills, Tornillo,* and *Buckley* pale in comparison with the sweep of the regulations presented in this case. *Mills* inhibited newspaper publishers only on election day; *Buckley* limited protected activities only during an election year; and *Tornillo* burdened the free press only to the extent of having to print certain candidates' replies. But here, the government has taken upon itself to restrain broadcasters from *ever* publishing a local newspaper and to *permanently* bar local newspaper publishers from consideration for broadcast licenses.

Ironically, if the FCC regulations had taken a more limited approach toward promoting diversity, their unconstitutionality would perhaps have been more readily apparent. For example, if the FCC promulgated a regulation denying broadcast licenses to all local publishers who refuse to adopt a right-of-reply policy in their newspapers, surely the court would not have hesitated to strike it down. Yet, since the regulations here have gone considerably further—since they have categorically refused licenses to those same publishers on the ground that they chose to publish at all—the court has lent them unqualified approval. This is a frightening example of "the dangers that beset us when we lose sight of the First Amendment itself, and

> march forth in blind pursuit of its 'values.'" *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 145 (1973) (Stewart, J., concurring).

C. The Regulations Have Not Been Narrowly Drawn to Protect Any Legitimate Governmental Objective

The Court of Appeals' only support for the constitutionality of the regulation—other than the improper notion that the First Amendment authorizes restrictions on the press to promote diversity—was the principle that newspapers are not immune from laws of general application that only indirectly affect publication. There is no dispute that newspapers are subject to an evenhanded application of the Sherman Act [12] or the Fair Labor Standards Act," [13] to "nondiscriminatory forms of general taxation," [14] and to other "regulation of . . . business or financial practices which do not involve First Amendment rights."[15] The Court of Appeals held that this principle validated a government ban on newspaper publication by broadcasters, saying:

> Of course, in serving the public interest the ban may indirectly affect the economics of publication, but the First Amendment does not provide a shield against this. *Associated Press*, 326 U.S. at 20, 65 S.Ct. 1416. [555 F.2d at 954 (JA 387).]

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[12] *Associated Press* v. *United States*, 326 U.S. 1 (1945).

[13] *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 192-93 (1946).

[14] *Branzburg* v. *Hayes*, 408 U.S. 665, 683-84 (1972), *citing Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

[15] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 155 (1973) (Douglas, J., concurring in the judgment).

As an attempted validation of these regulations, this is an astonishing statement. It distorts the design and effect of the ban, it wholly misconstrues the holding of the *Associated Press* case, and it finishes by upending the First Amendment.

These regulations do not "indirectly affect the economics of publication." They directly and purposefully prohibit local publication altogether by every broadcaster, irrespective of whether the publication would transgress any legitimate governmental objective unrelated to speech itself. Moreover, the enforcement of these regulations is not the mere "application of general laws"[16] to newspapers, which characterizes *Associated Press* and its progeny; rather, they are directed deliberately and exclusively at newspapers alone, and are calculated to achieve precisely what *Associated Press* forbade: a restraint upon newspapers' expression solely because they are newspapers. *See Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 193 (1946). They penalize newspapers, not *despite* the fact that they express ideas and viewpoints, but precisely *because* they do. Such regulations are patently unconstitutional. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

Nor can the regulations be defended on the ground that the FCC may consider antitrust policies in exercising its licensing powers. This Court has stated that such policies may properly be considered in determining whether a broadcaster's activities meet the statutory "public interest, convenience, and necessity" standards, and that

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[16] *Associated Press* v. *NLRB*, 301 U.S. 103, 132-33 (1967), *quoted in Branzburg* v. *Hayes*, 408 U.S. 665, 683 (1972).

> in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication. [*United States* v. *Radio Corp. of America*, 358 U.S. 334, 351-52 (1958).]

The present regulations, however, go far beyond any application of "antitrust considerations." They indiscriminately bar all newspaper-broadcast affiliations, without regard to whether any actual competitive harm —much less the kind of monopoly situation described in the *Radio Corporation* case—is present.

There was no effort whatever to achieve in these FCC regulations the precision which the Constitution requires. No attempt was made to restrict the ban to those whose media activities are monopolistic, anticompetitive, or in any way an abuse of the license privilege. They thus threaten to broadly stifle or penalize newspaper publication without achieving any legitimate governmental objective.

The FCC and the Court of Appeals actually recognized this to be so. In its Report, the Commission stated flatly that its regulations were "not in the least premised on improprieties in the operation of media holdings." 50 F.C.C.2d at 6085 (JA 211). It found that there was no claim, far less the requisite constitutional showing, that any broadcaster affiliated with a local newspaper had committed any noncompetitive acts. *Id.* at 1072 (JA 186). In rejecting the Department of Justice's unsupported divestiture arguments, the Commission observed that "merely stating that all daily news-

paper-VHF television combinations are inconsistent with the public interest and the anti-trust laws is not enough." *Id.* at 1080 n.29 (JA 201). Likewise, the Court of Appeals stated that the record assembled in the five-year proceeding to support the ban was "inconclusive," that its hoped-for benefits were "speculative," and that, at bottom, it was premised "primarily on policy, not factual considerations." 555 F.2d at 962, 965, 957 (JA 414, 427, 396).

Rules treading on First Amendment rights must be premised on sturdier bases. "[W]e again confirm the principle that when a State . . . burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant State policy requires more than a bare assertion, based on a conceded absence of supporting evidence, that the burden is connected to such a policy." *Carey* v. *Population Services International,* 97 S.Ct. 2010, 2022-23 (1977).

These regulations, if defended on the ground of "antitrust considerations," thus cannot even begin to survive the "exacting scrutiny" which must be given to any rules limiting the exercise of First Amendment rights. *Elrod* v. *Burns, supra,* 427 U.S. at 362; *Buckley* v. *Valeo, supra,* 424 U.S. at 44-45, 64-65.

> [E]ncroachment "cannot be justified upon a mere showing of some legitimate state interest." *Kusper* v. *Pontikes,* 414 U.S. at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. . . . Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, and the Government must "emplo[y] means closely drawn to avoid unnecessary abridgement . . . ." *Buckley* v. *Valeo, supra,* 424 U.S. at 265. "[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties." *Kusper* v. *Pontikes, supra,* at 59. [*Elrod* v. *Burns, supra,* 427 U.S. at 362-63 (additional citations and footnote omitted).]

Accord, Wooley v. *Maynard,* 430 U.S. 705, 716-17 (1977).

In sum, the FCC and the Court of Appeals have wholly misperceived the government's legitimate role in promoting diversity in the media. "The Commission has a duty to encourage a multitude of voices but only in a limited way, *viz.,* by preventing monopolistic practices and by promoting technological developments that will open up new channels." *Columbia Broadcasting System, supra,* 412 U.S. at 157-58 (Douglas, J., concurring in the judgment). Further than this the Constitution will not allow the government to go:

> Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that "fairness" was far too fragile to be left for a Government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice. [*Columbia Broadcasting System, supra,* 412 U.S. at 145-46 (Stewart, J., concurring).]

This case requires the Court to confirm that choice again.

III.

THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE FCC IN ORDERING THE FCC TO ADOPT A RETROACTIVE RULE REQUIRING UNIVERSAL DIVESTITURE

If this Court should conclude that the FCC has both the statutory and constitutional authority to adopt regulations barring newspaper-broadcaster affiliation, then the question of the Court of Appeals' expansion of those regulations must be considered. The Court of Appeals held that it was irrational for the FCC to adopt a prospective rule without also adopting a retroactive rule compelling divestitures by all existing locally-affiliated broadcast stations and newspapers. As will be demonstrated herein, the court grossly exceeded its legitimate judicial review function in ordering the FCC to expand its regulations.

In reviewing the FCC's exercise of its rulemaking power, the Court of Appeals first declared that the administrative record "no more establishes that cross-ownership serves the public interest than injures it. After years of study, the record was essentially inconclusive." 555 F.2d at 962 (footnote omitted) (JA 413-14). It then hypothesized that "[h]ad the Commission reasoned that because diversified ownership is prima facie in the public interest, local cross-ownership violates the public interest, it would have been rational for it to conclude that divestiture was generally called for . . . ." *Id.* (JA 414). According to the court, the Commission might have supported the adoption of such a presumption by referring to (1) its statutory obligation to "encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g); (2)

"the policies of the First Amendment"; and (3) the Commission's own "long-standing policy . . . that diversification of media sources is of central importance." *Id.* at 962-63 (JA 417-18).

Although the court found that such an approach would have been rational, it recognized that "[t]he Commission did not do this, however." *Id.* at 963 (JA 418). Instead, the Commission elected to grandfather all but a few cross-ownership situations because it found the record inconclusive—if not barren—regarding any public benefit flowing from divestiture, while also finding specific evidence of direct public harm that might result from broadscale divestitures.

But the court found itself unpersuaded by the Commission's decision to grandfather. The court's own judgment was that the three areas of public harm pinpointed by the Commission—loss of local ownership and mangement, loss of continuity in operation and programming, and economic dislocations—were not of sufficient weight to overcome the court's own preference for the presumption approach. *Id.* at 963-65 (JA 419-26). From this judgment the court leaped without further analysis to the conclusion that its presumption idea was not merely *one* rational standard, but rather the *only* rational standard. It declared any other standard to be *irrational*. *Id.* at 965 (JA 426).

Finally, having established its own presumption theory as the controlling criterion, the court then searched the record for evidence affirmatively establishing that cross-ownership was of public benefit. Finding none sufficiently persuasive, the court declared that the FCC was compelled to order divestiture. *Id.* at 965-66 (JA 426-31).

It is axiomatic that in reviewing agency actions, "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971). The court's function is to correct errors of law and to ensure that the agency action is rational. 5 U.S.C. § 706 (1970). Beyond that, it is not for the court to supplant the agency's determination "with one more nearly to its liking." *Permian Basin Area Rate Cases,* 390 U.S. 747, 792 (1968).

As will be shown below, the Court of Appeals' treatment of the FCC's rulemaking decision repeatedly violated these cardinal principles governing judicial review of administrative actions. Specifically, the court exceeded its proper function in three major respects:

(a) It overrode the FCC's exercise of its discretion to distinguish between retroactive and prospective application in its rulemaking;

(b) It usurped the FCC's policymaking function by creating a new rule of law under the guise of a "presumption";

(c) It substituted its own evaluation of the factors considered by the FCC in assessing the public interest by mandating the elevation of "diversity" to supremacy over all other interests.

Each of these errors is discussed below.

A. The FCC's Exercise of Its Discretion to Distinguish Between Retroactive and Prospective Rulemaking Was Not Irrational

Because of the unfairness inherent in the application of new rules to past conduct, retroactive administrative rulemaking is disfavored. 1 K. Davis, *Administrative Law Treatise,* § 5.08 at 340-41 (1958). Rather, agencies have been admonished to prefer prospective rulemaking in carrying out their quasi-legislative functions. *SEC* v. *Chenery Corp.,* 332 U.S. 194, 202 (1947). This is particularly true where, as here, the new rule departs from the agency's long established prior practice. *Retail, Wholesale & Department Store Union* v. *NLRB,* 466 F.2d 380, 388-90 (D.C. Cir. 1972); *NLRB* v. *Majestic Weaving Co.,* 355 F.2d 854, 860-61 (2d Cir. 1966).

Consistent with this fundamental preference for prospective-only rule changes, agencies and legislatures alike frequently accompany the adoption of new regulations with a "grandfather" provision. Such provisions permit rulemakers the flexibility to phase in a new policy without dismantling the built-up expectancies and reliance interests of those who have conducted themselves in accordance with a previous policy. The provisions are an indispensable regulatory tool where the rulemakers judge, on balance, that their policy change can best be effectuated gradually, rather than being attended with the disruption, inequities, and other mischief of a wholesale, abrupt departure from past policy.

Because such grandfathering is often the fairest and most reasonable approach to policy shifts, it is a practice which appears in virtually every regulatory context, and which has received unanimous, unqualified judicial endorsement.[17] Significantly, grandfathering

[17] *E.g., City of New Orleans* v. *Dukes,* 427 U.S. 297, 304-05 (1976) (city ordinance prohibiting street vendors grandfathered vendors in operation for eight years); *United States* v. *Citizens &*

is a common FCC approach to that agency's adoption

S. Nat'l Bank, 422 U.S. 86 (1975) (amendments to Bank Holding Company Act grandfathered certain transactions which stood unchallenged as of July 1, 1966); *USV Pharmaceutical Corp.* v. *Weinberger*, 412 U.S. 655, 658 (1973) (amendments to Federal Food, Drug, and Cosmetic Act added new drug efficacy requirements, but grandfathered all drugs then being commercially sold and not classified as "new drugs" under original Act); *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6-7 (1970) (revocation of federal tax exemption for certain category of nonprofit corporations included grandfathering of existing corporations); *First Nat'l Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 258 (1966) (National Bank Act prohibited certain category of branch banks, but grandfathered existing branches); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944) (amendment to Natural Gas Act required certificate of convenience and necessity for gas sale, but grandfathered existing operations); *United States* v. *Maher*, 307 U.S. 148, 153 (1939) (Motor Carrier Act required carriers to obtain permit or license, but grandfathered existing carriers); *Stanley* v. *Public Util. Comm'n*, 295 U.S. 76, 78 (1935) (state law required common carriers to obtain certificate of convenience and necessity, but grandfathered existing carriers); *Sampere* v. *City of New Orleans*, 166 La. 776, 117 So. 827 (1928), *aff'd per curiam*, 279 U.S. 812 (1929) (city zoning ordinance prohibiting business establishments in certain area grandfathered existing businesses); *Watson* v. *Maryland*, 218 U.S. 173, 176-77 (1910) (state law requiring physicians to be licensed grandfathered physicians previously in practice); *Mobil Alas. Pipeline Co.* v. *United States*, 557 F.2d 775, 781 (5th Cir. 1977) (Interstate Commerce Act authorized ICC to suspend new carrier rates, but grandfathered certain initial rates); *Johnson* v. *Mathews*, 539 F.2d 1111, 1114-15 (8th Cir. 1976) (establishment of federal eligibility criteria for disability income maintenance program grandfathered those already eligible under similar state programs); *Natural Resources Defense Council, Inc.* v. *EPA*, 529 F.2d 755, 759-60 (5th Cir. 1976) (EPA Clean Air Act regulations revised criteria for state implementation program, but grandfathered certain nonqualifying practices); *Iowa Indep. Bankers* v. *The Board of Governors of the Fed. Reserve Sys.*, 511 F.2d 1288, 1294-95 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 875 (1975) (state statute prohibited acquisition of state banks by out-of-state bank holding companies, but grandfathered existing out-of-state companies); *Poynter* v. *Drevdahl*, 359 F. Supp. 1137, 1143-44 (W.D. Mich. 1972) (university regulation prohibited non-dormitory residence by single students, but grandfathered existing non-dormitory residence).

of new standards."[18] Even more importantly, it is a practice that has been followed with regularity by the FCC in the precise area now before this Court—regulations designed to promote diversity through limitations on multiple ownership."[19] As the FCC expressly recognized in its decision in this case: "[T]he [proposed] idea of divestiture of ownership was a departure from the typical Commission approach of limiting any new rules to prospective effect." 50 F.C.C.2d at 1047 (JA 137).

The courts, in reviewing the FCC's regulations in the past, have recognized and endorsed the FCC's judgment that it should seek to avoid the disruption and unfairness of divestitures required by retroactive ap-

[18] *E.g.*, *FM Broadcast Rules*, 40 F.C.C. 720 (1962) (existing FM stations with non-conforming power grandfathered); *Daytime Skywave Transmission Rules*, 18 P&F Radio Reg. 1845 (1959) (existing station interference grandfathered); *CATV Rules*, 2 F.C.C.2d 725 (1966) and 36 F.C.C.2d 143 (1972) (existing CATV signals grandfathered); *Telephone Terminal Equipment Rules*, 59 F.C.C.2d 83 (1976) (existing terminal equipment grandfathered under registration program).

[19] *E.g.*, *Multiple Ownership Rules* (Docket No. 14711), 45 F.C.C. 1476 (1964) (stricter prohibitions on common ownership of overlapping stations in same service (AM, FM or TV); existing ownerships grandfathered); *Multiple Ownership Rules* (Docket No. 18110), 22 F.C.C.2d 306 (1970) (so-called "one-to-a-market" restriction on station ownership; existing ownerships grandfathered); *Multiple Ownership Rules* (Docket No. 8967), 18 F.C.C. 288 (1953) (numerical limitation on multiple ownership of stations established a level to avoid "unduly disruptive" extensive divestiture); *Report on Chain Broadcasting* (Order 37, Docket No. 5060) (1941) (limitation on network ownership of stations established at level to avoid "unduly disruptive" extensive divestiture).

plication. For example, in upholding the Commission's Chain Broadcasting Regulations in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 207 (1943), this Court noted that the FCC had decided not to require the universal divestiture of all existing network-owned stations. Instead, "since substantial business interests ha[d] been formed on the basis of the Commission's continued tolerance of the situation, it was found inadvisable to take such a drastic step." *Id.* Similarly, in *Storer Broadcasting Co.* v. *United States*, 240 F.2d 55, 56 n.3 (D.C. Cir. 1957), the court upheld the FCC's Multiple Ownership rules, noting specifically that the numerical limitations on AM and FM ownership were based on the FCC's "experience, coupled with a design to avoid undue disruption of existing station ownership." Likewise, in *Buckeye Cablevision, Inc.* v. *FCC*, 387 F.2d 220 (D.C. Cir. 1967), the court once again endorsed the FCC's decision to limit new requirements to prospective application, stating:

> We think the "grandfather rights" manifested the Commission's "felt need for regulating * * * [CATV], while at the same time * * * satisfied the dictates of fairness by affording sanction for enterprises theretofore established." [387 F.2d at 228, *quoting United States* v. *Maher*, 307 U.S. 148, 153 (1939).]

Most recently, in *Teleprompter Cable Communications Corp.* v. *FCC*, No. 75-1563 (D.C. Cir. Sept. 19, 1977), the same court considered the FCC's 1972 cable television rules which had applied prospectively only the agency's new standards regarding importation of distant signals. The court found "unwarranted and arbitrary" the FCC's failure to grant a certificate of compliance pursuant to the grandfather provision. Slip op. at 11.

These decisions reflect our deeply-felt aversion to retroactive lawmaking. They furthermore explain the long-held principle that statutes and regulations are presumed to operate prospectively "in the absence of clear expression to the contrary." *Hassett* v. *Welch*, 303 U.S. 303, 314 (1938); *Miller* v. *United States*, 294 U.S. 435, 439 (1935). Finally, they are consistent with this Court's express directive to federal administrative agencies to prefer prospective rulemaking in carrying out their regulatory responsibilities:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. [*SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).]

Moreover, the general directive of *Chenery* is particularly apposite to the FCC's regulations in light of the recognized "legitimate renewal expectancies implicit in the structure of the [Communications] Act." *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). *Accord, Alianza Federal de Mercedes* v. *FCC*, 539 F.2d 732, 736 n.9 (D.C. Cir. 1976). While a broadcaster has no vested property right to his station license, the reasonable expectancy of renewal for a licensee who has performed in the public interest is integral to the licensing system. It provides licensees the incentives both to strive for a high standard of broadcast performance and to make the investment necessary to achieve that standard. Thus, the court below has in the past recognized that "the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service." *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971).

Here, the FCC acted in accordance with our legal system's fundamental preference for prospective rulemaking. It complied with this Court's specific directive to administrative agencies to prefer such rulemaking. *SEC* v. *Chenery Corp., supra.* And it acted in a manner consistent with its own prior practice and with the legitimate renewal expectancies of meritorious licensees under the Communications Act. Thus, by deciding against broad divestiture, the FCC "responded to the felt need for regulating . . . through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established." *United States.* v. *Mahler,* 307 U.S. 148, 153 (1939). *Accord, City of New Orleans* v. *Dukes, supra,* 427 U.S. at 304-05; *United States* v. *Maryland Savings-Share Insurance Corp., supra,* 400 U.S. at 6-7. The Court of Appeals' decision that it was "irrational" for the FCC to do so cannot be sustained.

B. The Court of Appeals Usurped the FCC's Policymaking Function by Creating a New Rule of Law Under the Guise of a "Presumption"

The basic issue before the Commission in its rulemaking proceeding was whether existing broadcast licensees affiliated with local newspapers serve the "public interest," or whether the public interest demands the breakup of all such combinations through forced divestitures. After an extended proceeding in which proponents of all viewpoints were given the opportunity to make showings supporting or opposing the proposed rule, the Commission concluded that the case had not been made to support the position that sweeping divestitures would be in the public interest.

The Court of Appeals did not disagree with the FCC's evaluation of the record. Rather, the court found that "the record was essentially inconclusive." 555 F.2d at 962 (JA 413-14). However, undeterred by the absence of support in the record for a divestiture order, the Court ruled that the Commission was obliged to create a "presumption"—that "cross-owned stations do not serve the public interest" (*Id.* at 963 (JA 417)) —and to order divestitures on the basis of that "presumption." *Id.* at 966 (JA 431). In other words, the court ordered the Commission to presume the answer to the very question being addressed in the rulemaking proceeding, and to promulgate a divestiture rule based upon this presumption rather than upon the record and the Commission's expertise.

In simplest terms, the Court of Appeals held that the FCC erred by requiring record support before adopting the proposed rule. According to the court, the FCC should have assumed the existence of a problem, though the "inconclusive" record failed to support it (*Id.* at 962 (JA 414)), and should have adopted a drastic remedy, though any benefit admittedly was "speculative" (*Id.* at 965 (JA 427)). Had the agency in fact acted in this manner, its action would have been a classic example of agency abuse.

It is a basic principle of administrative decisionmaking that "the proponent of a rule or order has the burden of proof." Administrative Procedure Act § 7(c), 5 U.S.C. § 556(d) (1970). It is equally basic that a showing of a problem is a necessary predicate for adoption of a regulation to remedy the problem. "A regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if the problem does not exist." *City of Chicago* v. *FPC,* 458

F.2d 731, 742 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

The burden to document the need for a proposed rule has particular force here since its effects necessarily carried a threat of great and irreparable harm to the public interest; that is, it would either force licensees to cease publication of their local newspapers, or it would force the licensees to cease broadcast services in their communities even though their licenses had been granted and repeatedly renewed over a period of many years, each time upon an FCC finding that the "public interest, convenience and necessity" was thereby served. Indeed, many of the existing licenses were obtained as a result of the FCC's own policy for many years of encouraging newspaper publishers to enter broadcasting. If that policy was to be reversed and hundreds of licenses suddenly found to be contrary to the public interest, a persuasive showing supporting such a result was surely not an irrational agency requirement. "Divestiture has a substantial impact, and should be required only when we can determine that it is required by the public interest." 50 F.C.C.2d at 1080 n.29 (JA 201).

Here, the record failed altogether to support the proposed rule. The record showed, for example, that there was one significant difference between the performance of newspaper-affiliated broadcasters and other broadcasters: the newspaper-affiliated broadcasters have a demonstrated record of "statistically significant superiority" in the important area of local news and public affairs programming.[20] Nowhere in the record was a claim made that any newspaper-affiliated stations

[20] This conclusion was documented by the FCC's own staff study. 50 F.C.C.2d at 1078 n.26 and App. C (JA 198 and 230-41).

had engaged in anticompetitive acts. 50 F.C.C.2d at 1072 (JA 186). To the contrary, the record showed a long history of public service in connection with a number of such stations. 50 F.C.C.2d at 1078 (JA 198).

In terms of diversity, nothing in the record suggested that the affiliation between a newspaper and a broadcast station meant that the two reflected the same viewpoint. Indeed, the record showed that the two typically have entirely separate and independent reporting and editorial staffs, management and policies. *Id.* at 1059-60, 1089 (JA 161-62, 219-20). "Were it otherwise and the two operated jointly," said the Commission, "it might have been necessary . . . to require divestiture in many more situations." *Id.* at 1089 (JA 219). The record furthermore showed an established "pattern of a continuing separation" of newspaper-television affiliation as a result of normal market forces. *Id.* at 1061, 1080 n.29 (JA 164, 202).[21] Relying on this pattern, and taking account of the further reduction of newspaper-affiliated stations that would result from its prospective ban, the Commission concluded that wholesale divestiture was not required. *Id.* (JA 201-02).

The proponents of sweeping divestiture simply failed to support their rhetoric and suppositions with facts. The Department of Justice, for example, was an active participant, but could offer only "general observations" regarding media competition "rather than submit data upon which industry-wide divestiture could be based." *Id.* (JA 201). The FCC was constrained to observe with respect to the Department's unsupported

[21] The evidence in the record showed that the percentage of television stations that are affiliated with newspapers had declined from 48% in 1948, to 14% in 1969, and to less than 11% in 1974. 50 F.C.C.2d at 1061, 1080 n.29 (JA 164).

assertions that "merely stating that all daily newspaper-VHF television combinations are inconsistent with the public interest and the anti-trust laws is not enough." *Id.* (JA 201).

The Court of Appeals, however, avoided the fact that there was no *showing* that existing affiliated local newspapers and broadcast stations are contrary to the public interest by the simple expedient of *presuming* that they are. The bases asserted by the court to support its "presumption" are entirely circular. Whether either the broad statutory standard of encouraging "larger and more effective use of radio," or First Amendment policies, or FCC policies favoring diversity would in fact be substantially advanced by divestiture was the very question presented in the proceeding.[21] To presume that divestiture would further these policies and serve the public interest is to engage in the ultimate in question-begging.

But the court not only ruled that the Commission could have engaged in such a process, it held that the Commission was "compelled" to resolve the rulemaking proceeding in that manner. 555 F.2d at 966 (JA 431). The court was thus using the presumption as

[21] In its Further Notice of Proposed Rulemaking, which initiated this proceeding, the FCC noted that it had "insufficient information" and "substantial concern about the possible effects" of divestiture. 22 F.C.C.2d at 340, 348 (JA 103, 119). The Commission thus stated the purpose of the proceeding: "[C]omments filed in this proceeding to date have led us to the view that it might be in the public interest to fashion rules embracing divestiture and newspaper ownership, and we seek through the vehicle of this further notice to make a careful examination of the matter." 22 F.C.C.2d at 340 (JA 103-04). Nevertheless, the Court of Appeals criticized the Commission for "never explain[ing] that or why it had abandoned the presumption suggested in the notice of proposed rulemaking." 555 F.2d at 963 (JA 919).

would a legislative body, creating the kind of controlling legal presumption that is a transparent technique for "concealing by fiction a change in the substantive law." *See* F. James, *Civil Procedure* § 7.9 at 259-60 (1965). Whatever the propriety of such a presumption if created by Congress or if developed by the FCC, the Court of Appeals clearly has no authority to engage in such a legislative function.

The impropriety of the court's decision in this respect is exemplified by the squarely contrary decision by the same court only three weeks later in *Home Box Office, Inc.* v. *FCC*, No. 75-1280 (D.C. Cir. Mar. 25, 1977), *cert. denied*, 46 U.S.L.W. 3190 (U.S. Oct. 3, 1977). In *Home Box Office*, the court noted the absence in the record of "factual data . . . which would allow [the FCC] to assess the likely effect of its rules on various fields of competition." Slip op. at 64. Instead, said the court, arguments in this regard advanced by the Department of Justice were "basically speculative" and were "premised on the unverified assumption that enhancement of competition—actual or potential—is always a good." *Id.* at 65. The court then pointedly warned: "Serious questions would be raised if the Commission sought to justify its rules solely on the basis of such a presumption." *Id.* at 65 n.73.

The Court of Appeals here, however, held that the FCC was *compelled* to rest its decision on precisely such an "unverified assumption" or "presumption." 555 F.2d at 966 (JA 431). The "presumption" it created was a patent device for ordering the FCC to regulate in a manner more to the liking of the Court of Appeals, without regard either to the record before the agency or to the FCC's judgment as to where the public interest lay.

C. The Court of Appeals Improperly Substituted Its Own Evaluation of the Factors Considered by the FCC in Assessing the Public Interest

As discussed above, *supra* at 40-46, the preference for prospective rulemaking is deeply imbedded in our legal system and reflects both a sensitivity toward those who have established their operations under existing legal standards and a desire to implement policy shifts without undue disruption. That preference was itself sufficient reason for the FCC to decide not to order universal divestiture by hundreds of existing broadcast licensees whom the Commission, through its license renewal practice, had consistently found to be serving the public interest.

However, the Commission's judgment was actually premised on a good deal more. Its decision was also soundly based on specifically identified countervailing considerations which, in its opinion, outweighed any speculative benefits that could be claimed for divestitures. The Commission concluded that the proposed regulations gave "too little weight to the consequences" of universal divestiture (50 F.C.C.2d at 1078 (JA 197)), and explained:

> Having said that our primary concern is diversity in programing service, we have analyzed the question of requiring full-scale divestiture under standards and with regard for considerations which are relevant under our broad public interest mandate. This does not mean that the Justice Department's concern for economic competition is irrelevant; only that it is of secondary concern under the Commission's regulatory responsibilities. After reviewing the record in this context, we believe that because of the disruption and losses which could be expected to attend divesti-

> ture—resulting in losses or diminution of service to the public—divestiture should be limited to use in only the most egregious cases. [*Id.* at 1080 (JA 200-02) (footnotes omitted).]

The Court of Appeals, again acting as if Congress had empowered it, rather than the FCC, to implement the Communications Act, simply disagreed with the Commission's judgment and sought to substitute its own.

Thus, for example, the FCC was concerned about the effect on the quality of broadcast service that would result from wholesale displacement of existing broadcast station owners. This concern was based on the agency's extensive experience in observing and evaluating the effect on broadcast service of continuity of ownership and management. For example, in recognition of the public interest benefits of continuity, it has in the past established rules dealing with license transfers and "trafficking". 47 C.F.R. § 1.597 (1976). In so doing, it has specifically relied upon "the benefits which we believe, based on our experience, come from sustained ownership." ***Procedures on Transfer & Assignment Applications,*** 32 F.C.C. 689, 690 (1962). Its judgment in the present proceeding, again relying on its accumulated experience and expertise, was that the loss of continuity would adversely affect broadcast services. 50 F.C.C.2d at 1078, 1080 & n.29 (JA 197-98, 200-02). The disruption in continuity of service would mean, the FCC found, that "the new owner would lack the long knowledge of the community and would have to begin raw." Id. at 1078 (JA 197).

The court, however, dismissed this whole area of consideration as having "scant force in this case," reasoning that "[a] one-time alteration in the owner-

ship structure of the broadcast industry should not effect [sic] the public's interest in quality programming because the new owners will become the beneficiaries of any unofficial policy of continuity." 555 F.2d at 964 (JA 422). Thus, incredibly, the court dismissed the agency's concern regarding drastic and abrupt disruptions of service because, after the disruption had taken place, "continuity" could begin anew.

The court similarly dismissed in summary fashion the FCC's concern that disruption would be especially harmful because so many of the sales under a broad divestiture order would be to non-local interests. 50 F.C.C.2d at 1078 (JA 197). The court simply eliminated this factor with the statement that "even if transfer to non-local owners entails extraordinary disruption, there is no basis for assuming that such transfers will result from divestiture." 555 F.2d at 964 (JA 423). The court's statement erroneously ignored the record, which included an extensive and detailed study that analyzed the economic impact of widespread divestiture and concluded that purchasers of many divested stations would be multiple owners and nationwide conglomerates. 50 F.C.C.2d at 1063 (JA 167). The statement also ignored the fact that a ban on local station ownership imposed simultaneously on a large number of broadcasters would by its very nature almost inevitably lead to widespread trading by local owners for distant stations. *Id.* at 1068-69 (JA 178-79).

The Commission thus based its decision not only on considerations of fundamental fairness, but also on its recognition that widespread divestiture, a "severe

remedy" which it has always used sparingly, carried with it harm to the public interest. Had the record been persuasive in showing actual harm from current licensees' newspaper affiliations, the Commission might have decided differently. But nothing compelled it to impose such a drastic remedy, even though the Court of Appeals might have found a different result more in keeping with its own predisposition on the policy questions presented.

Even where a problem is shown to exist—which it was not here—an agency has broad discretion in selecting from among various solutions and remedies. Here the regulations adopted by the Commission implemented a multi-faceted approach to newspaper-broadcaster affiliation. The regulations provided that (1) no new broadcast license will be granted to a local newspaper publisher; (2) any existing broadcast licensee who acquires or establishes a local newspaper in the future will be required to divest its broadcast license within a year; (3) no transfer of a license by an existing broadcaster will be approved if the transfer also includes sale of an affiliated newspaper to the same person; and (4) forced divestitures will be required within five years by any licensee who owns the only local newspaper and the only local television or radio station. "It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 225.

A regulation is not invalid because "it might have gone farther than it did," *Roschen* v. *Ward,* 279 U.S. 337, 339 (1929), or because it "take[s] one step at a time," *Williamson* v. *Lee Optical, Inc.,* 348 U.S. 483,

489 (1955). *Accord, Califano* v. *Jobst*, 46 U.S.L.W. 4004, 4007 (U.S. Nov. 8, 1977); *City of New Orleans* v. *Dukes, supra*, 427 U.S. at 304. Whether the Court of Appeals might have struck a different balance is beside the point. As this Court has admonished courts reviewing administrative agency decisions:

> Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. [*Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).]

See also Butz v. *Glover Livestock Commission Co.*, 411 U.S. 182, 185-86 (1973); *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112-13 (1946).

The Court of Appeals here did not merely "slid[e] unconsciously" into the domain of policy. It affirmatively embraced policy decisions at each turn and dictated to the Commission the court's own view of policy for the communications media, without regard to either the record produced before the FCC in its extended proceeding, the FCC's accumulated experience and judgment, or the fundamental limitations on the scope of the court's legitimate review function. In all this, the court grossly misjudged its role.[33]

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[33] Even assuming that the FCC had erred, the Court of Appeals was not empowered to order the Commission to adopt a broader rule. As this Court held in *NLRB* v. *Food Store Employees Local 347*, 417 U.S. 1, 9-10 (1974):

> It is a guiding principle of administrative law, long recognized by this Court, that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940) [additional citations omitted]. Thus, when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course.

Accord, NLRB v. *Enterprise Association of Steam Pipefitters Local 638*, 429 U.S. 507, 522, n.9 (1977); *South Prairie Construction Co.* v. *Local 627, Operating Engineers*, 425 U.S. 800, 803-06 (1976); *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331-34 (1975); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

By "order[ing] the Commission to take further steps to ensure that everyone would be consistently treated *under the standard already adopted for new license applicants*," 555 F.2d at 970 (emphasis added) (JA 443), the court below violated the cited principle. Its order improperly foreclosed the Commission on remand from further explaining its reasons for rejecting broader divestiture, from obtaining or citing additional evidence in support of its reasons for rejecting broader divestiture, or from choosing to treat all groups alike by rejecting both retroactive and prospective prohibitions on cross-ownership.

In rendering its decision to grandfather most existing newspaper-licensee cross-ownership, the FCC acted within its area of particular expertise, considered all relevant factors, thoroughly reviewed and relied upon the record, and properly articulated a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). The lower court's criticisms of the Commission's decision, and its ultimate reversal of that decision, are a blatant and classic example of a reviewing court improperly "substitut[ing] its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe, supra*, 401 U.S. at 416.

CONCLUSION

For the reasons stated, NAB respectfully submits that the FCC's regulations exceed its statutory and constitutional authority and that, therefore, the decision of the Court of Appeals upholding their validity should be reversed.

Alternatively, if it is found that the regulations are within the Commission's authority, NAB respectfully submits that the court below exceeded its proper judicial review function in finding that the FCC could not adopt a prospective-only rule and in requiring the FCC to expand its rule to order divestitures. Therefore, the portion of the Court of Appeals' decision vacating the regulations with respect to existing licensees and remanding to the FCC with instructions to order divestitures should be reversed.

Respectfully submitted,

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APPENDIX

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The relevant provisions of the Administrative Procedure Act of 1946, as amended, are as follows:

5 U.S.C. § 556(d):

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The relevant provisions of the Communications Act of 1934, as amended, are as follows:

47 U.S.C. § 151:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio . . ., there is created a commission to be known as the "Federal Communications Commission"....

47 U.S.C. § 152(a):

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided . . . .

47 U.S.C. § 303(g):

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

. . . .

Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the

larger and more effective use of radio in the public interest;

47 U.S.C. § 309(a):

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.